

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RASHID ALI HASSAN,

Plaintiff,

v.

YARDEN WEIDENFELD, *et al.*,

Defendants.

CASE NO. C11-2026-JCC

ORDER

This matter comes before the Court on the Report and Recommendation (Dkt. No. 76) of the Honorable Brian A. Tsuchida, United States Magistrate Judge, and Defendants' objections to that Order. (Dkt. No. 78.) Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby ADOPTS the Report and Recommendation in full.

I. BACKGROUND

In this 42 U.S.C. § 1983 action, Plaintiff alleges that Officer Thomas McLaughlin, Officer Tammy Frame, and the City of Seattle violated his constitutional rights by utilizing excessive force in the course of an arrest, denying him equal protection, demonstrating deliberate indifference to his serious medical needs, falsely arresting him, and failing to intervene. (Dkt. Nos. 10, 22.) After filing both an amended and supplemental complaint (Dkt. Nos. 10, 22) establishing the basis of his claims—familiarity with which is presumed—Defendants moved for

1 summary judgment on all claims. (Dkt. No. 46.) At the time they filed the instant motion for
2 summary judgment, Plaintiff was proceeding *pro se*. Mr. Hassan responded to Defendants’
3 motion and alleged in his brief (for the first time in the proceedings) that “Officer Tammy Frame
4 kicked [him] in the face causing him excruciating pain and fracturing his skull.” (Dkt. No. 54 at
5 6.) Subsequently, the Court provided Mr. Hassan with a *Rand* notice, and he filed a second
6 response to Defendants’ motion. Plaintiff again alleged that Officer Frame kicked him in the
7 head and injured him. (Dkt. No. 55 at 5.) Finally, Mr. Hassan filed a signed declaration (while
8 still proceeding *pro se*) stating that Officer Frame kicked him in the face. (Dkt. No. 60 at 3.)

9 Subsequently, Mr. Hassan obtained counsel to represent him in this matter. His counsel
10 stipulated with Defendants’ counsel to extend the briefing deadlines for the pending summary
11 judgment motion and to permit Mr. Hassan’s counsel to file a third response on Plaintiff’s
12 behalf. (Dkt. Nos. 70, 71.) In the second stipulation for an extension, the parties agreed that
13 “plaintiff will file a response to the motion that supersedes the multiple, previously filed
14 responses.” (Dkt. No. 71.) Plaintiff’s counsel then filed a renewed response to Defendants’
15 motion, in which Plaintiff did not address his excessive force claim based on being kicked in the
16 head, and did not file a renewed declaration. (Dkt. Nos. 72, 73.)

17 Following the completion of the parties’ briefing, Judge Tsuchida issued a Report and
18 Recommendation (Dkt. No. 76), in which he recommends granting summary judgment to
19 Defendants on all but one of Plaintiff’s claims. The survivor was Plaintiff’s § 1983 excessive
20 force claim, in which Plaintiff alleges that Officer Tammy Frame kicked him in the head. Judge
21 Tsuchida recommends denying summary judgment on this claim because there exists a disputed
22 issue of fact as to whether this actually occurred. While Plaintiff’s new counsel did not file a new
23 declaration (or any supporting evidence) with his renewed response brief, Judge Tsuchida relied
24 upon Plaintiff’s previously filed declaration (Dkt. No. 60), in which he swore that he was in fact
25 kicked in the head, to conclude that Defendants’ declarations to the contrary demonstrated a
26 disputed issue of material fact. (Dkt. No. 76 at 2.)

1 Following issuance of Judge Tsuchida's Report and Recommendation, Defendants filed
2 objections to Judge Tsuchida's recommendation on Plaintiff's excessive force claim. In short,
3 Defendants argue that Judge Tsuchida improperly relied on Plaintiff's prior declaration because
4 (1) Plaintiff's counsel failed to include the declaration in the renewed response or otherwise
5 argue that there existed a disputed issue of fact as to Officer Frame's use of force; and (2) the
6 parties expressly agreed, with Court permission, that the response filed by Plaintiff's counsel
7 would "supersede" Plaintiff's prior responses to Defendants' motion. (Dkt. No. 78.) Plaintiff has
8 not filed any objections or otherwise responded to the Report and Recommendation or
9 Defendants' objections.

10 **II. DISCUSSION**

11 The district court must "make a de novo determination of those portions of the
12 [magistrate judge's] report or specified proposed findings or recommendations to which
13 objection is made." 28 U.S.C. § 636(b)(1). Here, Defendants object only to the fact that Judge
14 Tsuchida considered Mr. Hassan's previously filed declaration in which he declared under
15 penalty of perjury that Officer Frame kicked him in the head. They argue that because Judge
16 Tsuchida should not have done so given that the renewed response "superseded" the prior
17 "responses," and Plaintiff's counsel failed to support the renewed response with a new
18 declaration from Plaintiff or other evidence, there was no disputed issue of fact regarding Officer
19 Frame's use of force. (Dkt. No. 78.)

20 The Court disagrees. While the parties stipulated that the response brief would supersede
21 those previously filed by Plaintiff when he was proceeding *pro se*, Defendants cannot request the
22 Court to blindfold itself to obvious facts which were evident in the otherwise slim record. Of
23 course, Plaintiff's counsel must be prepared to support his arguments with actual evidence, and
24 his last response was not a model brief. However, given that Plaintiff had already filed, while
25 proceeding *pro se*, a declaration under penalty of perjury stating the basis for his excessive force
26 claim, Judge Tsuchida was entitled to consider it notwithstanding the parties' stipulated

1 amendment of the briefing schedule, as that declaration remained part of the record.
2 Additionally, subsequent to Judge Tsuchida's R&R, Plaintiff's counsel filed a renewed
3 declaration in which he states that he does intend to rely on Plaintiff's prior declaration and will
4 be able to present additional witnesses on Plaintiff's excessive force claim. Accordingly, the
5 Court is not persuaded that it should grant summary judgment to Defendants in the face of
6 obvious evidence that creates a genuine issue of material fact. Defendants' objection is
7 overruled.

8 The Court has otherwise reviewed Plaintiff's proposed complaint, the Report and
9 Recommendation, and the balance of the record, and adopts the Report and Recommendation in
10 full.

11 **III. CONCLUSION**

12 For the foregoing reasons, Defendants' objections to the Report and Recommendation
13 (Dkt. No. 78) are overruled. Accordingly, the Court hereby ORDERS:

- 14 1. The Report and Recommendation is ADOPTED;
- 15 2. Defendants' motion for summary judgment (Dkt. No. 46) is DENIED in part with
16 respect to Plaintiff's claim that Officer Tammy Faye used excessive force by kicking Plaintiff in
17 the head while he was prone and defenseless;
- 18 3. Defendants' motion for summary judgment (Dkt. No. 46) is GRANTED with
19 respect to all other claims and defendants;
- 20 4. Plaintiff's document at Docket Number 54, which the Court construes as a Rule
21 36(b) motion to withdraw admissions, is GRANTED;
- 22 5. Except with respect to the date of Plaintiff's criminal acquittal, the unsupported
23 allegations contained in Plaintiff's response brief (Dkt. No. 72) are STRICKEN as specified in
24 Defendants' reply brief (Dkt. No. 73 at 11–12);
- 25 6. The Clerk is respectfully directed to send a copy of this Order to the parties and to
26 Judge Tsuchida.

1 DATED this 13th day of August 2013.

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8 John C. Coughenour
9 UNITED STATES DISTRICT JUDGE
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